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FILE:

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Office: VERMONT SERVICE CENTER

Date: **JAN 06 2006**

IN RE:

Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Maui Johnson

& Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer.

(i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Environmental Policy and Resource Economics from Mississippi State University (2001). The director found that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as

“exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that he will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Eligibility for the waiver must rest with the alien’s own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner’s contributions in the field are of such unusual significance that he merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

The intrinsic merit and national scope of the petitioner’s work are immediately apparent. It remains to be shown that this particular individual, to a greater extent than others performing similar work, qualifies for a special exemption from the job offer/labor certification requirement which, by law, normally attaches to the visa classification that he has chosen to seek.

The petitioner submitted several letters of support from current and former colleagues.

Assistant Professor of Medicine, Harvard Medical School, Associate Chief of Pulmonary and Critical Care Medicine at Veterans Administration (VA) Medical Center in Boston, and scientist at the Channing Laboratory, Brigham and Women’s Hospital in Boston, states:

I hired [the petitioner] to work with me starting in June 2000 at the VA Medical Center in Boston. He was hired to be a Health Statistician for two research projects following his completion of a Masters Degree in statistics (in addition to his Ph.D.). He was responsible for the data analysis for a NIH-funded project examining the risk of lung cancer in a cohort of 54,000 U.S. railroad workers, and a VA-funded project examining respiratory illness and pulmonary function decline in a cohort of 450 subjects with spinal cord injury. [The petitioner] has substantially and uniquely contributed to both research projects. He currently works at the Channing Laboratory, Brigham and Women’s Hospital where he has continued this work with me, as well as works on other projects that have included the assessment of environmental lead toxicity and the association of inhaled particles with death from cardiac diseases.

* * *

[The petitioner] is part of a study that has been collecting pulmonary data on 450 subjects at the Department of Veterans Affairs Medical Center in Boston with spinal cord injury on a yearly basis so that the natural history of lung function and the development of respiratory illness can be assessed. He has served as data manager and analyst. He has validated data by frequency analysis, distribution review, missing data and records searching, database comparing, and chart review. He conducted cross-sectional and longitudinal analysis using categorical data analysis and mixed models with AR(1) error structure to assess pulmonary function in spinal cord injury which was presented at the annual meeting of the American Paraplegia Society in 2001. Respiratory illnesses are the most common cause of death in chronic spinal cord injury, yet risk factors for chest illnesses following injury are poorly described. He is the first to use negative binomial distribution with general estimating equation (GEE) methodology to analyze chest illness. His research findings were presented at the 99' American Thoracic Society (ATS) International Conference in 2003 and a manuscript is in preparation.

[The petitioner] is an extremely qualified programmer and statistician with sufficient expertise in statistics such that he can substantially contribute to the approach taken towards data analysis in addition to programming in a specialized statistical language called SAS. . . . He possesses high-level knowledge of SAS, especially in Marco Language, Structured Query Language (SQL), Statistical Procedures (STAT), and data *null* techniques (BASE). [The petitioner's] solid training in SAS Macro, proficiency with SAS Macro and analytical skills make him especially qualified to carry our research. Among the specific skills he possesses are SAS, S-PLUS, STATA, Unix, ORACLE, ACCESS, EXCEL, Geographic Information Systems (GIS), and other computer languages such as FORTRAN, C, and BASIC.

We note here that any objective qualifications that are necessary for the performance of a health statistician position can be articulated in an application for alien labor certification. It cannot suffice to state that the petitioner possesses useful skills or a unique background as a programmer and statistician. Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *See Matter of New York State Dept. of Transportation* at 221. We accept that the petitioner has contributed to projects undertaken at the VA Medical Center and the Brigham and Women's Hospital in Boston, but his ability to impact the greater field beyond these projects has not been adequately demonstrated.

██████████ Co-Director, Channing Laboratory, Department of Medicine, Brigham and Women's Hospital, and ██████████ Professor of Medicine at Harvard Medical School, states:

I have known [the petitioner] three years during which time he has worked mostly for ██████████ but also has done some work directly for me that involved managing an extremely complex data set on heart rate variability in relation to air pollution exposure.

* * *

Although we have other Ph.D. statisticians working in our group, at the time he was hired by Dr. [REDACTED] we were looking for a candidate who could provide not only expertise in statistics but also had the capability to function independently in carrying out both the computer processing as well as statistical analysis of complex data sets. In addition, because of [the petitioner's] understanding of the environmental policy issues, he was uniquely qualified to work with [REDACTED] on his studies of diesel exhaust exposure and risk of lung cancer. . . . In fact, it was extremely difficult to find an individual other than [the petitioner] who had sufficient strengths and expertise in the field to join the group.

A shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification. *See Matter of New York State Dept. of Transportation* at 220-221.

[REDACTED] is a Professor of Occupational and Environmental Medicine at the Harvard School of Public Health. He is also an Associate Professor of Medicine at Harvard Medical School and a physician-scientist at the Channing Laboratory, Brigham and Women's Hospital in Boston. [REDACTED]

[The petitioner] plays a key role in the NAS [Normative Aging Study] project involving multidisciplinary scientists. He has developed a computational macro to automatically merge and update cognitive test performances including the Neurobehavioral Evaluation System 2 (NES2), Wechsler Adult Intelligence Scale-Revised (WAIS-R) test, the Consortium to Establish a Registry for Alzheimer's Disease (CERAD) test, and the Mini-Mental State Exam (MMSE). This macro has enabled us to efficiently examine the relationship of bone and blood lead to cognitive function in healthy community-dwelling men, to assess whether accumulated lead in bone was a better biomarker for cognitive performance impairment than was lead in blood, and to test the hypothesis that higher lead levels are associated with a decline in cognitive test performance.

[The petitioner's] interdisciplinary knowledge and experience have enabled him to make significant contributions in this field. Besides the NAS data management and data updating, he has created various research datasets for his colleagues from complex NAS databases. Among those datasets are the bone and blood lead and cognitive function dataset, the anonymized dataset, the hypertension genetics dataset, the bone and blood lead and urinary NTX dataset, the bone and blood lead and environmental exposure dataset, and the bone and blood lead, gene, and mini-mental exam score dataset. He has conducted statistical analysis to examine whether the C282Y or H63D hemochromatosis gene variants independently or combined are associated with body lead burden using GLM, ANOVA, TTEST, and Hardy-Weinberg proportions test.

* * *

[The petitioner] has solid [sic] theoretical background and special skills in longitudinal data analysis and statistical modeling that have placed him uniquely in my research group. He possesses high-level knowledge of SAS, especially in SAS macro language, advanced data manipulation techniques, structured query language, and statistical procedures. He has excellent SAS skills with the ability to debug, troubleshoot, and provide quality review of complex SAS programs. Along with his singular

knowledge of SAS, he has solid training and mastery in other analytical techniques such as S-PLUS and STATA, database management skills such as Unix, Oracle, and Access, and high-level computer language such as Fortran, C, and Visual Basic. Therefore, [the petitioner's] abilities are too unique to be duplicated or matched by another with similar education and experience.

In the same manner as [REDACTED] Associate Professor at the Institute of Atmospheric Science of South Dakota School of Mines and Technology, also focuses on the petitioner's "unique skill" in developing "various complex SAS macros."¹ As noted previously, it cannot suffice to state that the petitioner possesses solid training or unique skills. Regardless of the alien's particular experience or skills, even assuming they are unique, the benefit the alien's skills or background will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process. *See Matter of New York State Dept. of Transportation* at 221.

[REDACTED] Research Associate Professor, Boston University School of Public Health, and a consulting scientist at the Channing Laboratory at Brigham and Women's Hospital in Boston, states:

I first started working with [the petitioner] in the summer of 2002 on an analysis project involving environmental lead toxicity, involving cognitive functioning, at the Channing Laboratory, Brigham and Women's Hospital. This is part of the prospective Normative Aging Study (NAS) Given the complicity of data sources and irregular time intervals, designing the data structures and manipulating the databases require not only extraordinary computer skills and statistical modeling skills, but also require knowledge of the subject field under investigation. [The petitioner's] education and working experience made him uniquely qualified for this task. He has developed a computational macro to automatically merge and update cognitive tests that include continuous performance, pattern comparison, pattern memory, digit span backward, vocabulary, word list memory, constructional praxis, Boston naming test, verbal fluency, and MMSE test scores. This macro has served as a major source to be able to efficiently analyze the prospective relationship between bone/blood lead levels and cognitive function for healthy community-dwelling men, and to test the hypothesis that higher lead levels are associated with a decline in cognitive test performance.

We are currently working on a sentinel publication that describes our most recent analyses of the role of cumulative lead exposure and cognitive functioning in an older population. [The petitioner's] considerable expertise in programming and integrating several different database structures has been crucial to complete this project.

The expectation that results from the petitioner's work will be published at some unknown future date is not adequate to demonstrate that his work has had a significant impact as of the petition's filing date. *See Matter of Katigbak*, 14 I&N Dec. 45 (Comm. 1971). The petitioner must demonstrate that his work has already significantly influenced the greater field.

[REDACTED], Professor of Forest Economics and Management, Mississippi State University, states:

[REDACTED] states that he has known the petitioner "for more than 20 years as a college classmate, a colleague, and a friend."

I have known [the petitioner] since 1997, initially as major professor and director of his dissertation committee, then as a colleague and friend. I also had [the petitioner] in a course I instructed. [The petitioner] has an excellent educational background and extensive experience in environmental and natural resource economics and statistics.

* * *

[The petitioner's] Ph.D. research focused on the inter-regional impacts on the forest products industry of environmental regulations pertaining to protection of the spotted owl. [The petitioner] developed a regression model to analyze the trends in new capital expenditures for the logging, lumber and wood products, and paper and allied products industries in the Pacific Northwest and South. The model was designed to determine the long-run trend in new capital expenditures and the deviations from that trend after 1988, the year harvesting restrictions to protect the northern spotted owl were imposed. His research demonstrated that the forest products industry was shifting its new capital investment from the Pacific Northwest to the South. [The petitioner] . . . published his findings in the *Journal of Forestry*, the national forestry journal.

We acknowledge that the petitioner has co-written at least one paper with his former Ph.D. supervisor, Dr. [REDACTED] but the evidence presented is not adequate to show that his published findings have had an unusual level of impact on the greater field. We do not find that publication of one's work is presumptive evidence of eligibility for a national interest waiver. When judging the influence and impact that the petitioner's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Numerous independent citations would provide firm evidence that others have been influenced by the petitioner's work. Their citation of the petitioner's work demonstrates their familiarity with it. If, on the other hand, there are few or no citations of an alien's work, suggesting that that work has gone largely unnoticed by the greater field, then it is reasonable to question how widely that alien's work is viewed as being noteworthy. It is also reasonable to question how much impact — and national benefit — an individual's work would have if his findings did not influence the direction of future studies. The petitioner, however, has submitted no evidence of cites to his published work.

We note that the petitioner's initial witnesses were limited to individuals affiliated with institutions where he has studied or worked. With regard to letters of support from one's colleagues, the source of the recommendations is a highly relevant consideration. These letters are not first-hand evidence that the petitioner's work is attracting attention on its own merits, as we might expect with findings or methodologies that are unusually significant. While letters from the petitioner's research supervisors and collaborators are important in providing details about his role in various research projects, such letters fall short of establishing the petitioner's impact on the field beyond the walls of the institutions where he has worked. In this case, the witnesses' statements are not supported by direct evidence (such as numerous independent citations) showing that the petitioner's work has been especially important or even recognized in his field of endeavor.

The petitioner also submitted evidence of his membership in the American Statistical Association and four award certificates presented to him by the Ministry of Forestry of the People's Republic of China. The record includes no evidence of the selection criteria for these awards from the early 1990's. Nevertheless, we find that recognition for achievement in one's field and professional memberships relate to the criteria for classification as an alien of exceptional ability, a classification that normally requires an approved labor

certification. We cannot conclude that meeting one, two, or even the requisite three criteria for classification as an alien of exceptional ability warrants a waiver of the labor certification requirement in the national interest.

The director denied the petition, stating that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States. Noting a lack of cites to the petitioner's published articles and a lack of independent witnesses attesting to the significance of the petitioner's work, the director concluded that the evidence of record did not establish that the petitioner "has had a substantial impact in his field of endeavor."

On appeal, the petitioner submits three additional letters of support.

Professor, Obstetrics and Gynecology, University of Calgary, states:

I have been a visiting Scholar at the Harvard School of Public Health, Harvard University from September 2003 – August 2004. I was on sabbatical with Professor Howard Hu who was my sponsor for the duration of this period of study. During that time, I became acquainted with [the petitioner] and worked with him on a project related to the impact of lead on the sex ratio of Women in Mexico City.

In my recent study on lead and sex ratio analyses of Mexico women, I have used [the petitioner's] RANK macro and his data structure design methods to my research. . . . We employed [the petitioner's] macro and methods to perform quintile and quartile analyses of maternal patella lead, maternal tibia lead, and cord blood lead, and extract analytical data from cohort 1 and cohort 2. Without [the petitioner's] methods, I could take a long time to finish my manuscript entitled "The impact of material lead exposure on the second sex ratio" (in press).

We do not find a former collaborator's use of the petitioner's analytical methodologies to be indicative of substantial national impact. Further, it is apparent that [redacted] employed the petitioner's methods in the lead and sex ratio study subsequent to the petition's filing date. *See Matter of Katigbak* at 45.

[redacted], now a Professor of Biostatistics and Medicine at the University of Rochester, previously held an adjunct faculty position at the Harvard School of Public Health from 2000 to 2003. [redacted]

Approximately 450,000 people live with Spinal Cord Injury (SCI) in the US. There are about 10,000 new SCI's every year. Respiratory illnesses are the most common cause of death in chronic SCI. Chest illness risk has been ascribed to related respiratory muscle dysfunction, but has not been studied carefully. [The petitioner] is the first to use negative binomial distribution with general estimating equation (GEE) methodology accounting for repeated measures to assess longitudinal predictors of chest illness for the patients with chronic SCI. His research findings were presented at the 99th American Thoracic Society (ATS) International Conference in 2003. He also conducted experimental design, cross-sectional and longitudinal analysis using mixed models with AR(1) error structure to assess pulmonary function and its relationships with other chronic diseases for the patients with different levels of SCI which was presented at the annual meeting of the American Paraplegia Society in 2001. Lung cancer is the leading cause of cancer deaths in the U.S. Diesel exhaust has been suspected to be a lung carcinogen. Modeling the relationship between diesel exposure and lung cancer

mortality has been limited for a long time because of lack of sufficient data, scientific design, and efficient methodology. Using scientific designs and computational macros developed by [the petitioner], he and his colleagues are the first to successfully employ Cox Proportional Hazard Models to assess lung cancer mortality in 54,973 U.S. railroad workers. Their most recent findings were presented at the 97th American Thoracic Society (ATS) International Conference in 2001 and published in *Environ Health Perspect* 112:1539-1543 (2004). The lead-exposed rat demonstrates increased vascular reactive oxygen species (ROS). ROS are thought to contribute to degenerative changes in the vasculature, a manifestation of which is an increase in the pulse pressure [the difference between systolic blood pressure (SBP) and diastolic blood pressure (DBP)]. [The petitioner] and his colleagues used simple and multiple linear regression to exam bone lead measures as predictors of pulse pressure in humans in a sub-study of the Normative Aging Study, a longitudinal cohort of aging. They presented their findings in The International Society for Environmental Epidemiology (ISEE) 2004.

The record, however, includes no evidence (such as citations) showing that the journal publications and conference presentations discussed in [redacted] letter attracted an unusual level of interest throughout the field. Further, we note that the article in *Environ Health Perspect* and the ISEE presentation occurred subsequent to the petition's filing date. A petitioner, however, must establish eligibility at the time of filing. See *Matter of Katigbak* at 45.

[redacted] Professor of Medicine and Director of Respiratory, Environmental and Genetic Epidemiology, Harvard Medical School, states: "There is a critical need for individuals with a combination of statistical and programming skills in the United States and it is well recognized that all national projections are that we are below national estimates for this job category." As noted previously, a shortage of qualified workers in a given field does not constitute grounds for a national interest waiver. See *Matter of New York State Dept. of Transportation* at 220-221.

[redacted] further states:

As previously stated in the original letters of recommendation, [the petitioner] is unique in that he has the appropriate statistical training as well as computer and scientific skills based on his Ph.D. training to understand the reasoning behind complex analytic research problems. He has been instrumental in the research work on the health effects of diesel exhaust exposure on lung cancer in railroad workers. There is no question that research in this area as well as several other areas that he is involved will suffer substantially if he were forced to leave the Channing Laboratory. In this regard, publication or even citation is not the critical issue here. The critical issue is would his leaving the lab set back our research effort.

While Citizenship and Immigration Services recognizes the importance of the petitioner's research projects, eligibility for a national interest waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. We do not dispute that the petitioner's work has been important to the Channing Laboratory, but there is no evidence showing that his methods and findings are of greater impact or national benefit than those of others in his field. The observations from various witnesses about the importance of the studies at the Channing laboratory establish the intrinsic merit and national scope of the petitioner's work, but their comments are not adequate to

show that the petitioner's individual accomplishments are of such an unusual significance that he qualifies for a waiver of the job offer requirement. By law, advanced degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987). Congress plainly intends the national interest waiver to be the exception rather than the rule.

While all of the witnesses describe the importance of the petitioner's research, we note that they all have ties to institutions with which he is affiliated. This fact indicates that while the petitioner's work is valued by those close to him, others outside his immediate circle are largely unaware of his work and do not attribute the same level of importance to his work.

In this case, we find that the available evidence lacks independent support for the assertion that the petitioner's specific contributions have outweighed those of others in his specialty. While the petitioner may have contributed to research projects undertaken at the Channing Laboratory and the universities he attended, his ability to measurably influence the field beyond those projects has not been adequately demonstrated. Clearly, the petitioner's current and former colleagues have a high opinion of the petitioner and his work. The petitioner, however, has failed to demonstrate that his work has had a nationally significant impact. In conclusion, we find that the petitioner has not established that his past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on the national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given project or area of research, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.